IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs April 22, 2009

STATE OF TENNESSEE v. MATTHEW DION SANDERS

Direct Appeal from the Circuit Court for Williamson County
No. II-CR113038 Robert E. Lee Davies, Judge

No. M2008-02201-CCA-R3-CD - Filed July 16, 2009

The Defendant, Matthew Dion Sanders, pled guilty to one count of attempted aggravated robbery, and the trial court sentenced him as a Range II offender to eight years in prison. On appeal, the Defendant contends that the trial court erred when it sentenced him to eight years and when it denied him an alternative sentence. After a thorough review of the evidence and the applicable authorities, we affirm the trial court's judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID H. WELLES and JERRY L. SMITH, JJ., joined.

Dana M. Ausbrooks, assistant Public Defender, Franklin, Tennessee, for the Appellant, Matthew Dion Sanders.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Matthew Bryant Haskell, Assistant Attorney General; Kim Helper, District Attorney General; Mary K. White, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

A Williamson County grand jury indicted the Defendant on one count of attempted aggravated robbery. The Defendant pled guilty to this offense and agreed to be sentenced by the trial court. At his sentencing hearing, the parties agreed that the Defendant was a Range II multiple offender, and the trial court admitted the presentence report into evidence. Additionally, the following evidence was presented: Joshua Clifton, the victim in this case, testified that, in August of 2007, two men wearing hats came to his home around 2:00 p.m. as he prepared to leave for work. He said the two men knocked him down and dragged him to the

kitchen. They asked him where "the money" was, and one of the men searched his house while the other man pointed a gun at him. Clifton said they searched his home for thirty or forty minutes and then left, taking nothing. Clifton described the two men, saying that one was African-American and the other was Hispanic and that neither wore a mask. During the attack the men discussed that they knew that Clifton's parents had a dry cleaning business, which was accurate. Clifton said that at the beginning of the attack he was "in shock and scared" but that he became calmer as the attack progressed. Clifton recalled that one man pointed a gun at him for the duration of the attack.

Detective John Wood testified that he was the lead detective in this investigation. He recalled that the Brentwood Police Department received a 911 call about this incident and that the victim provided the police with a description of the suspects' vehicle. According to this description, the suspects' vehicle had multiple Atlanta Braves hats located in the rear window behind the back seat. The victim also said the African-American suspect wore a silver chain bearing the Atlanta Braves "A" logo. A patrol officer, John Maxwell, saw a vehicle matching the victim's description that appeared to be evading him. Detective Wood later saw a vehicle matching the description in another location. He learned that the vehicle was registered to Sara Smith, the Defendant's live-in girlfriend. The Detective learned the Defendant's identity and then placed him in a photographic line-up, where the victim identified him as one of his attackers.

Detective Wood opined that the robbery was planned, because the suspects knew where the victim lived and knew he had money in the house. The detective testified that he recovered text messages from Smith's phone relating to directions to, and the physical address of, the victim's residence. The detective recalled that he arrested and interviewed the Defendant shortly after this robbery. During the interview, the Defendant waived his Miranda rights and denied involvement in this robbery. The Defendant did not identify any other individuals who may have been involved in the robbery.

On cross-examination, Detective Wood testified that the Defendant never contacted him to identify the other individual involved in the robbery. The detective agreed that no other arrests had been made in this case.

On redirect examination, Detective Wood agreed that the presentence report indicated that the Defendant provided names of two accomplices to this crime. He said, however, that Smith, not the Defendant, provided him with this information. Detective Wood identified text messages he retrieved from the Defendant's phone, some of which referenced the Brookfield Subdivision, where this crime occurred. Those text messages listed the sender or recipient "Angel," which was the Defendant's alias.

At the close of the State's proof, the State informed the court that the Defendant had, in fact, provided the State with the names of his accomplices.

John Young, the Defendant's friend and former employer, testified that he had known the Defendant for four or five years. The Defendant worked at Young's limousine service as an

administrative assistant and driver for "about a year and a half." Young said he remained in contact with the Defendant, and he assured the court that, if the Defendant were released, the Defendant could reside with Young, who lived alone. Young told the court he believed the Defendant had good intentions and needed an opportunity to get himself "together" for his eight-year-old son. Young said the Defendant had custody of, and financially provided for, his son when he was not incarcerated. Young also testified he did not know of an occasion where the Defendant used illegal drugs.

On cross-examination, Young testified he was aware the Defendant had previously stolen a car but was not aware of any other previous criminal convictions. Specifically, Young was unaware that the Defendant had previously been convicted of auto burglary twice and theft once. He also did not know that the Defendant received probation for those two other felony convictions, which the Defendant subsequently violated. Young did know, however, that the Defendant had been convicted of assault while this case was pending.

The Defendant testified about this incident saying he was involved with the wrong friends. He said he has always worked and taken care of his son. He said the problem began when he allowed his friends to stay with him and his girlfriend. He said he regretted what he had done and he apologized. He said he had made mistakes in the past but had not been in trouble in the last eight years. The Defendant testified that he was "just . . . a[n] extra person helping out," but he agreed that his crime should be punished. The Defendant then clarified that he had pled guilty to crimes in the last eight years but that none of them were violent, rather they were driving offenses. He also said he had pled guilty to one assault in 2007, but his last felony conviction was in 2000.

The Defendant discussed his criminal past. He said he was convicted for auto burglary in 2000 and given probation. While on probation, he was arrested for auto burglary again, which was a violation of his probation. The Defendant said he violated his parole in 2001. The Defendant told the court that, while he had not been successful on probation in the past, he was older now and knew that, regardless of his friends, he was not going to commit any crimes. He said he just wanted to get out of prison and take care of his son. The Defendant then apologized directly to the victim.

On cross-examination, the Defendant said that his role in this crime was making sure that his friend did not get hurt. He conceded, however, that he was the one with the gun and that he pointed the gun at the victim while his accomplice searched the house. The Defendant said he did not recall telling the victim that they knew that the victim's family owned a dry cleaning business.

The Defendant agreed he had been convicted as a juvenile of theft over $1000 and of burglary. He was placed on probation, and he violated that probation. He agreed that, as an adult, he was convicted of theft and received probation. He said he violated his probation by not reporting but explained that he could not report because he did not have transportation. Upon being reminded that he did not have a driver's license, the Defendant said that he would nonetheless report if granted probation again, explaining his friends and family would drive him

to his probation officer. The Defendant said that he was given parole, which he violated by being convicted of two counts of burglarizing cars. He said, in those incidents, he was again the "look out." The Defendant said that he was released from prison in 2003 and that in 2004 he received several driving on a revoked or suspended license charges. The Defendant agreed that his phone was the one sending and receiving messages about the location of the victim's house and that the gun he pointed at the victim was loaded.

Based upon this evidence, the trial court sentenced the Defendant to eight years and denied him an alternative sentence, stating:

> [I]n this case we start with the fact that this is a Class C felony, and the first issue for me to determine is whether you are a Range II offender. In looking at that, I do find that you have two prior felony convictions. The first one being the theft in Davidson County and the second one being the felony burglary in Rutherford County which there are actually two, but you – either way I look at it, you qualify as a Range II offender in this case and that's what I'm going to find today, that you are a Range II.
>
> Now in terms of setting your sentence within this range, I'm required to start at the minimum which is six years and look at the Enhancement Factors in this case pointed out by the State. There is no question that you have a previous criminal history that goes all the way back to when you were 15, and of course that previous criminal history includes felonies and misdemeanors, so I find that factor.
>
> With regard to a leader in the crime, I am hesitant to call you the leader in the crime because I don't think you were and I – I'm just not sure what they mean by being a leader in the crime, so I'm not going to consider that factor.
>
> I am going to consider the next factor that you have failed to comply with conditions of probation; that you have failed to comply with conditions of parole. You've done that on more than one occasion.
>
> I'm also considering delinquent acts that you committed as a juvenile in that you testified as to the one felony that you committed as a – as a juvenile. . . . [I]n considering the three that I have mentioned, I am going to enhance your sentence up to nine years.
>
> Then I'm required of course to look at the mitigating factors that came out at your hearing and the only mitigating factor that I find is I do think you're remorseful. I don't find your cooperation to be anything of substance, so I'm going to reduce your sentence from nine years to eight years.

The trial court denied the Defendant an alternative sentence, stating that confinement was necessary to protect society by restraining the defendant with a long history of criminal conduct,

that confinement was necessary to avoid depreciating the seriousness of the offense, and that measures less restrictive than confinement had frequently or recently been applied unsuccessfully to the Defendant.

It is from this judgment that the Defendant now appeals.

II. Analysis

On appeal, the Defendant contends that the trial court erred when it sentenced him to eight years, and when it denied him an alternative sentence.

A. Length of Sentence

The Defendant contends that the trial court erred when it sentenced him to eight years because, he asserts, the trial court gave too little weight to the mitigating factor that he assisted the authorities in uncovering offenses committed by other persons or in detecting or apprehending other persons who had committed the offenses. *See* T.C.A. § 40-35-113(9). The State counters that the trial court properly sentenced the Defendant with his sentencing range.

When a defendant challenges the length, range or manner of service of a sentence, this Court must conduct a de novo review of the record with a presumption that "the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d) (2006). As the Sentencing Commission Comments to this section note, the burden is now on the appealing party to show that the sentencing is improper. T.C.A. § 40-35-401, Sentencing Comm'n Cmts. This means that if the trial court followed the statutory sentencing procedure, made findings of facts which are adequately supported in the record, and gave due consideration and proper weight to the factors and principles relevant to sentencing under the 1989 Sentencing Act, T.C.A. § 40-35-103 (2006), we may not disturb the sentence even if we would have preferred a different result. *State v. Ross*, 49 S.W.3d 833, 847 (Tenn. 2001). The presumption does not apply to the legal conclusions reached by the trial court in sentencing a defendant or to the determinations made by the trial court which are predicated upon uncontroverted facts. *State v. Dean*, 76 S.W.3d 352, 377 (Tenn. Crim. App. 2001); *State v. Butler*, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); *State v. Smith*, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994). Specific to the review of the trial court's finding enhancement and mitigating factors, "the 2005 amendments deleted as grounds for appeal a claim that the trial court did not weigh properly the enhancement and mitigating factors." *State v. Carter*, 254 S.W.3d 335, 344 (Tenn. 2008). The Tennessee Supreme Court continued, "An appellate court is therefore bound by a trial court's decision as to the length of the sentence imposed so long as it is imposed in a manner consistent with the purposes and principles set out in sections -102 and -103 of the Sentencing Act." *Id*. at 346.

In conducting a de novo review of a sentence, we must consider: (1) any evidence received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing, (4) the nature and characteristics of the offense, (5) any mitigating or enhancement factors, (6) the information provided by the administrative office of the courts as to sentencing

practices for similar offenses in Tennessee; and (7) any statements made by the defendant on his or her own behalf. *See* T.C.A. § 40-35-210 (2006); *State v. Taylor*, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001).

In the case under submission, the Defendant was convicted of a Class C felony, and he is a Range II, multiple offender. A multiple offender may be sentenced to between six and ten years for a Class C felony. T.C.A. § 40-35-112(b) (2006). The trial court found applicable three enhancement factors, and the Defendant does not contest the adequacy of the evidence supporting that finding. The trial court then found applicable one mitigating circumstance, that the Defendant was remorseful, and apparently found applicable but afforded little weight to a second mitigating circumstance, that he assisted the authorities in uncovering offenses committed by other persons or in detecting or apprehending other persons who had committed the offenses. There was some evidence provided at the sentencing hearing that the Defendant had offered the names of two of his accomplices. The Defendant never offered the whereabouts of those accomplices, and the police were never able to find or apprehend the accomplices. As we have discussed, however, the Defendant cannot object to the manner in which the trial court weighed a properly applied enhancement or mitigating factor. *Carter*, 254 S.W.3d at 344. Further, the evidence supports the trial court's imposition of an eight-year sentence. The Defendant is not entitled to relief on this issue.

B. Alternative Sentence

The Defendant next contends that the trial court erred when it denied him an alternative sentence because none of the reasons provided by the trial court provided a sufficient ground to deny him an alternative sentence.

A defendant not within "the parameters of subdivision (5) [of T.C.A. § 40-35-102], and who is an especially mitigated or standard offender convicted of a Class C, D or E felony, should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." *State v. Carter*, 254 S.W .3d 335, 347 (Tenn. 2008) (citing T.C.A. § 40-35-102(6) (2006)) (footnote omitted). To be sure, a "favorable status consideration" does not equate to a presumption that the Defendant should receive an alternative sentence. *Id.* As with other sentencing issues, whether a defendant receives alternative sentencing depends on the facts of the case. *State v. Taylor*, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987). Additionally, we note that a trial court is "not bound" by the advisory sentencing guidelines; rather, it "shall consider" them. T.C.A. § 40-35-102(6). If a defendant seeks probation, then the defendant bears the burden of "establishing [his] suitability." T.C.A. § 40-35-303(b) (2006). As the Sentencing Commission points out, "even though probation must be automatically considered as a sentencing option for eligible defendants, the defendant is not automatically entitled to probation as a matter of law." T.C.A. § 40-35-303 (2006), Sentencing Comm'n Cmts.

When sentencing the defendant to confinement, a trial court should consider whether:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;

(B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or

(C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

T.C.A. § 40-35-103 (2006).

In the case under submission, the trial court considered and found applicable all three of the aforementioned considerations. T.C.A. § 40-35-103(A)-(C). Our review of the record reveals that the evidence clearly supports one or more of these factors. As the trial court found, the Defendant has previously violated both his probation and his parole, making applicable the factor that measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the Defendant. *See* T.C.A. § 40-35-103(C). Further, the Defendant also has a long history of criminal conduct, including several felony convictions and multiple misdemeanor convictions. *See* T.C.A. § 40-35-103(A). These are sufficient reasons enough to deny the Defendant alternative sentencing. The Defendant is not entitled to relief on this issue.

III. Conclusion

After a thorough review of the record and applicable authorities, we conclude that the trial court properly sentenced the Defendant to eight years and denied him an alternative sentence. Accordingly, we affirm the trial court's judgment.

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ROBERT W. WEDEMEYER, JUDGE